

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DANIELLE HENRY,)	
)	C.A. No. 03C-07-009 JTV
Plaintiff,)	
)	
v.)	
)	
BRUCE D. FISHER, M.D., D.M.D.,)	
and SOUTHERN DELAWARE)	
ORAL AND MAXILLOFACIAL)	
SURGERY ASSOCIATES, P.A.,)	
)	
Defendants.)	

Submitted: May 28, 2010
Decided: August 31, 2010

Martin J. Siegel, Esq., New Castle, Delaware. Attorney for Plaintiff.

Gilbert F. Shelsby, Jr., Esq., and Michael J. Logullo, Esq., Shelsby & Leoni, Stanton, Delaware. Attorneys for Defendants.

Upon Consideration of Plaintiff's
Motion for a New Trial
DENIED

VAUGHN, President Judge

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ORDER

Upon consideration of the plaintiff's Motion for a New Trial, the defendants' opposition, and the record of the case, it appears that:

1. This is a medical malpractice action. The plaintiff alleges that Dr. Fisher deviated from applicable standards of care in failing to properly and timely diagnose and treat an infection that developed following his extraction of one of the plaintiff's wisdom teeth.

2. The case was tried by jury during the week of April 26, 2010. Following four days of trial, the jury returned a verdict in favor of the defendants.

3. The plaintiff raises three points in her Motion for a New Trial. First, the plaintiff contends that defense counsel's reference to the plaintiff and Brenda Durham, a fact witness, as domestic partners and/or life-mates may have prejudiced the jury. No objection was made when this occurred at trial. I find that the plaintiff waived this issue by failing to make a timely objection.¹

4. Next, the plaintiff contends that the cross-examination of the plaintiff during rebuttal was outside the scope of the direct examination. The plaintiff timely objected to this line of questioning at trial. Her objection was overruled. It is helpful, however, to discuss the sequence of some of the trial events that preceded the objection. The plaintiff was first called to the stand during her case in chief. During

¹ See *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 541 n.27 (Del. 2009) ("This Court has consistently required that any objections be made contemporaneously. Failure to do so waives any claim of error. The reasoning is simple: 'A party must timely object to improper statements made during closing argument in order to give the trial court the opportunity to correct any error.'") (internal citations omitted).

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her direct examination, she referred to her personal handwritten notes. Defense counsel, without objection from the plaintiff, cross-examined the plaintiff about the nature of the notes. When the plaintiff was called back to the witness stand during rebuttal, her testimony included a description of a conversation she recalled with Dr. Fisher concerning golf. During that testimony, she did not use or refer to her notes. On cross-examination, however, defense counsel again questioned the plaintiff regarding when and where her notes were recorded. The plaintiff's objection was made, and the following was held at sidebar:

MR. SIEGEL: This ground has been covered I don't know how many times during Mr. Lugullo's cross-examination of Miss Henry. It was asked repeatedly. About when she started the notes, why she did it. Whether they were the 13th or were they the 14th. This is extremely repetitive and certainly well beyond what would normally be the purpose of rebuttal and cross on rebuttal.

THE COURT: Well, credibility is within the scope of the direct. And I think that's where he's going.

MR. SIEGEL: I understand that, but it certainly has been asked and answered.

THE COURT: The objection is overruled.

5. The plaintiff contends that by "allowing the repetitive cross-examination regarding notes following [p]laintiff's rebuttal testimony (testimony that the [p]laintiff offered without resort to any notes) the Court allowed the jury to be given the case with the last testimony they heard being repetitive impeachment evidence,

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thereby perhaps giving the jury the sense that the Court felt this evidence (regarding notes) was so important that it deserved to be heard again (despite plaintiff not referring to her notes) and perhaps leading the jury to believe that the Court itself might have questions regarding the [p]laintiff's credibility."²

6. The defendants contend that the plaintiff's rebuttal testimony "attempted to portray Dr. Fisher in an unfavorable light of not being overly concerned about her treatment and more interested in playing golf. Once, [sic] the [p]laintiff opened the door as to her recollections and interactions with Dr. Fisher[,] it was within the scope of cross-examination [for] defense counsel to question her on her notes she allegedly took contemporaneously after almost all of her interactions with Dr. Fisher."³

7. I do not find the plaintiff's argument persuasive. Delaware Uniform Rule of Evidence 611(b) states: "*Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. In addition, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."⁴ The questioning concerning notes during cross-examination during rebuttal related to the plaintiff's credibility. I am satisfied that it was within my discretion to allow the cross-examination complained of, and that doing so was not error. In addition, while I reject the contention that the Court's ruling may have suggested to the jury that the

² Plaintiff's Motion For New Trial, at ¶ 9.

³ Defendants' Response to Plaintiff's Motion For New Trial, at ¶ 6.

⁴ D.R.E. 611(b).

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Court itself had questions about the plaintiff's credibility, I note that the Court did give a court impartiality instruction.⁵

8. Finally, the plaintiff contends that the less than thirty minute jury deliberation warrants a new trial. In support of this argument, she notes that "while the issues involved were not as technical or complex as might be found in some malpractice cases, the issues nonetheless involved dental and medical issues far beyond the common knowledge of the average lay person."⁶

9. In *Storey v. Camper*,⁷ the Delaware Supreme Court framed the grounds for awarding a new trial:

[A] trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached

⁵ The jury was instructed as to court impartiality as follows:

Nothing I have said since the trial began should be taken as an opinion about the outcome of the case. You should understand that no favoritism or partisan meaning was intended in any ruling I made during the trial or by these instructions. Further, you must not view these instructions as an opinion about the facts. You are the judges of fact, not me.

Del. Super. P.J.I. Civ. § 24.4 (2000).

⁶ Plaintiff's Motion For New Trial, at ¶ 11.

⁷ 401 A.2d 458 (Del. 1979).

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the result.⁸

10. I am not persuaded that a new trial is warranted in this case. The plaintiff developed an infection following the extraction of a wisdom tooth. An antibiotic was then prescribed by Dr. Fisher. The only allegation of negligence was that Dr. Fisher did not prescribe the antibiotic four days earlier. Dr. Fisher testified that he placed the plaintiff on an antibiotic as soon as he saw signs of a possible infection. The plaintiff, on the other hand, contended that she had signs of an infection the day her tooth was extracted, and that Dr. Fisher denied her request for an antibiotic on that day. The plaintiff's expert opined that once a patient has pain following a wisdom tooth extraction they must be put on an antibiotic. This expert was a general dentist, who had not performed dentistry in over ten years. The defendants produced three experts, two board certified oral surgeons and an infectious disease specialist. The two oral surgeons opined that Dr. Fisher met the standard of care and that the result would have been the same even if antibiotics had been administered earlier. The defendants' infectious disease specialist opined that once the bacteria was cultured at the hospital, it showed evidence of a bacteria that was resistant to the original antibiotic prescribed by Dr. Fisher. The plaintiff did not offer expert testimony to contradict this testimony. Accordingly, the jury was free to conclude that earlier antibiotics would not have changed the outcome of events.

11. I conclude that the plaintiff's arguments, even when considered as a whole, do not create an exceptional circumstance which entitles the plaintiff to a new trial.

⁸ *Id.* at 465.

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In addition, I find that the trial testimony provided competent evidence upon which the verdict could reasonably be based. Therefore, the plaintiff's motion for a new trial is hereby *denied*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
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